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No. 09-70

Supreme Court, U.S.
FILED
NOV 11 2009
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In The
Supreme Court of the United States

MODERN, INC., et al.,

Petitioners,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY TO ST. JOHNS RIVER WATER MANAGEMENT DISTRICT'S RESPONSE BRIEF

*DAVID SMOLKER
*Counsel of Record
ETHAN J. LOEB
MATHEW C. LUCAS
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, Florida 33602
813-223-3888
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ST. JOHNS HAS FAILED TO REFUTE MODERN'S REASONS FOR GRANTING PETITION

I. Modern's *Loretto*-Type Taking Argument Was Squarely Raised Below

St. Johns' argument that this Court lacks jurisdiction over Modern's *Loretto*-type taking claim because Modern represented that it was not asserting a "regulatory" taking is a "strawman" argument. Modern never made such representation, and to suggest otherwise ignores the fact that ***all*** of St. Johns' complained of conduct in this case was "regulatory" in character. The record establishes that: (i) Modern's complaint pled a *Loretto*-type taking; (ii) Modern successfully defeated St. Johns' motion to dismiss based on ripeness citing *Loretto*; and (iii) Modern itemized the various regulatory actions of St. Johns which Modern claimed gave rise to the taking in its responses to pre-trial discovery requests, its pre-trial statement, its trial brief, its closing statement and its initial brief before the Eleventh Circuit. App. 1-59.

The district court's passing characterization of Modern's taking claims as "physical" rather than "regulatory", like St. Johns' argument, is bottomed on a false "physical" versus "regulatory" taking dichotomy. This Court, the Eleventh Circuit and the Florida Supreme Court hold that under *Loretto v. Teleprompter Manhatten CATV Corp.*, 458 U.S. 419 (1982) where government ***by regulation*** compels an owner to suffer the ***physical invasion*** of its property

by a foreign source, a taking results. (Pet. 9, 25-26). The characterization of such takings as "physical" or "regulatory" is not legally meaningful since, such takings are both "physical" ***and*** "regulatory" in character. See, *Lingle v. Chevron*, 544 U.S. 528, 538 (2005). And in any event, this Court traditionally allows petitioners to make new ***argments*** in support of ***claims*** properly presented below even though they were not pressed or passed upon by lower courts. *Yee v. City of Escondido*, 503 U.S. 519 (1991) (where petitioners unquestionably raised a taking claim below they were free to make ***any*** argument in support of that claim before the United States Supreme Court, and were not limited to the precise arguments made below. *Id.* at 535.).

II. St. Johns' Jurisdictional Argument Is Contrary To Established Florida Supreme Court Decisions

St. Johns argues that Modern was required to raise and litigate its taking claim on appeal of St. Johns' final order in the prior state administrative proceeding. This argument has been squarely rejected by the Florida Supreme Court, which holds that a property owner has the "right to bring a separate claim of inverse condemnation in [state trial] court at the conclusion of all judicial as well as executive branch appeals regarding the propriety of the [administrative] action." *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement*

Trust Fund, 427 So.2d 153, 158 (Fla. 1982); *Albrecht v. State*, 444 So.2d 8, 12-13 (Fla. 1984).

III. The Argument That The Petition Should Be Denied Because Modern's Petition Requires Review Of Factual Findings And Application To State Law Fails

Modern does not seek review of the district court's finding that St. Johns did not cause the flooding that occurred several years after Modern purchased its property. Rather, it seeks review of the district court's conclusion that St. Johns' actions authorizing and requiring the installation of weirs and filling in of the 500-foot section of NS-1 could not be the legal cause of any ***subsequent*** flooding. St. Johns' assertion that the district court failed to find a physical invasion ignores the district court's express factual findings that "the primary cause ***of the flooding*** is the weirs and blockages in NS-1 and EW-1." Pet. App. 38, n.30, 35, 35, n.27.

St. Johns' argument that Modern's petition merely involves misapplication of a properly stated rule of state law also fails. The district court cited no rule of law in support of its legal causation ruling, and the prevailing law, which the district court appears to have overlooked, and which St. Johns does not contest, establishes that interference with the ability to abate flooding is actionable even though the initial obstruction was not chargeable to the defendant. (Pet. 22-24). The district court also failed

to address *Loretto* even though the Florida Supreme Court has adopted it. Thus, Rule 10's admonition is inapplicable where, as here, the district court's state law grounds are unclear, untenable and conflict with the applicable state law that adopts and is so interwoven with federal takings law so as not to be independent thereof.

IV. The Argument That The District Court's Decision Does Not Conflict With *Loretto* Fails

St. Johns' argument that *Loretto* is inapplicable because it did not involve the requirement that the landowner apply for a permit is another "strawman" argument that mischaracterizes Modern's taking claim as one based on the imposition of a permitting requirement. See, *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The gravamen of Modern's taking claim against St. Johns is not imposition of a permitting requirement. Rather, it is St. Johns' interference with Modern's ability to abate the flooding of its property. This Court's holding in *Loretto* would not have been different had the City's regulations in *Loretto* required Mrs. Loretto to obtain a permit in order to remove the offending cable box. This is because the moving force behind a *Loretto*-type taking is regulatory perpetuation of a physical invasion by a foreign force that the property owner has a right to be rid of. Such a taking is separate, distinct and independent of the argument that imposition of a permitting requirement amounts to a

taking. A similar attempt to conflate these two distinct takings arguments was rejected by the Federal Circuit in *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1346, n.5 (Fed. Cir. 2002) ("The *Loretto* claim is independent of the regulatory taking claims flowing from the permitting requirement imposed by the district court. It is only claims based on the imposition of the permitting requirement that fall under the rule articulated by the Court in *Riverside Bayview*.").

St. Johns' argument that the instant case is distinguishable from *Loretto* because St. Johns might issue a permit thereby making the physical invasion "temporary" rather than "permanent" is squarely refuted by *Loretto's* progeny. *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582-83 (Fed. Cir. 1993). ("for a physical invasion to be deemed 'permanent'"), it "need not be continuous and uninterrupted ... [a]n intermittent intrusion still causes a taking," and "[it] does not necessarily mean a taking of unlimited duration."); also see, *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991).

St. Johns' argument also ignores: (i) this Court's decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987) (recognizing a cause of action for a temporary taking for the period of time a zoning regulation prevented a property owner from having any reasonable use of his property); (ii) Florida Supreme Court decisions recognizing temporary takings as being compensable under the Florida Constitution based on

First English, see, *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 54, 58 (Fla. 1994) (temporary deprivation of substantially all economically beneficial or productive use of land may constitute a taking) and *Keshbro, Inc. v. City of Miami*, 801 So.2d 864 (Fla. 2001) (temporary closure of apartments ordered by nuisance abatement board constituted compensable temporary taking); and (iii) the binding Florida intermediate appellate court decision in *Associates of Meadow Lake, Inc. v. City of Edgewater*, 706 So.2d 50 (Fla. Dist. Ct. App. 5th Dist. 1998). In that case, the landowner sought inverse condemnation against the City of Edgewater on grounds that the City's construction of a park without a functioning drainage system flooded his property during the early part of 1991. *Id.* at 50. The City remedied the flooding by late 1991. *Id.* The landowner sought compensation for a "temporary" taking on grounds he was temporarily denied the reasonable use and enjoyment of the flooded property. *Id.* The City argued that the landowner failed to state a cause of action for inverse condemnation because it had not alleged that the flooding caused by the faulty construction was permanent. *Id.* at 51. The trial agreed and entered summary judgment in favor of the City. In reversing the trial court on appeal, the Fifth District Court of Appeal concluded, citing *First English*, that Florida "now recognizes temporary takings as being compensable under its constitution", and held that the trial court erred by "presum[ing] that no taking claim could be brought ... because the condition allegedly caused by the Edgewater had

been remedied." *Id.* at 52. Equally erroneous is St. Johns' presumption that there could be no taking under *Loretto* because a permit might be issued allowing the flooding to be remedied.

V. The Argument That There Is No Right To Immediately Abate Flooding Under Florida Law Fails

St. Johns' assertion that there is no right under Florida law to immediately abate flooding is fallacious because it dismisses Modern's contentions as false without demonstrating them to be so, while ignoring the detailed argument and authorities cited at pages 12-15 of Modern's Petition For Writ of Certiorari. The right inhering in the common law flowage easement under Florida law is at its core the right to immediately abate flooding through drainage canals.

St. Johns' argument that the Florida Legislature extinguished any such rights when it enacted chapter 373, Florida Statutes in 1972 is contrary to the plain language of the following Florida Statute sections: (i) 373.403(8), 403.813(1), 403.813(2)(f) and 403.813(2)(g) (excluding from permitting requirements maintenance of existing drainage canals and ditches); (ii) 373.418(1) (preserving all current exemptions and prohibiting construction of chapter 373 so as to remove or alter these exemptions); and (iii) 373.171(1) (requiring that water management district regulatory action not impair property rights).

VI. Modern's Petition Does Not Seek An Advisory Opinion As To The Effect Of *San Remo Hotel* On Modern's Reserved Federal Takings Claims

St. Johns' argument that Modern seeks an advisory opinion misses the point. Review by this Court would put an end to the taking liability phase of this litigation thereby potentially avoiding the need to ever address *San Remo Hotel, L.P. v. City & County of San Francisco, California*, 545 U.S. 323 (2005).

VII. The Argument That Determination Of The Extent And Scope of The Common Law Flowage Easement Issue Is Not Of Constitutional Dimensions Fails

St. Johns argues that determination of the scope of Modern's common law flowage easement is a matter of state substantive law, and, therefore, is not the kind of issue this court ordinarily addresses. St. Johns' argument is *reductio ad absurdum*. Its acceptance would preclude this Court's review of all lower federal court decisions under the Federal Quiet Title Act since the quieting of proprietary rights necessarily involves the application of existing rules or understanding stemming from state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Moreover, where, as here, the decision of the federal court of appeals is one to which state laws and decisions are applicable, a conflict with or refusal to follow a decision of the highest state or intermediate appellate court is grounds for this Court's review. In this

case, the Florida Supreme Court and intermediate appellate courts recognize both the continuing validity and scope of the common law flowage easement and the axiomatic rights to maintain easements. The district court's and Court of Appeals' refusal to fully adjudicate the location, scope and extent of Modern's common law flowage easement consistent with Florida law warrants this Court's review.

VIII. The Argument That An Upper Owner's Common Law Drainage Easement Does Not Encompass The Right To Maintain Existing Drainage Ditches Across A Lower Owner's Property Is Unsupportable

St. Johns argues that the English common law right to abate nuisance flooding caused by a neighbor's failure to maintain a drainage canal is dependent upon the neighbor's assumption "of an obligation to scour a ditch, presumably through a written contract or other written obligation." (Resp. Br. 26). St. Johns cites no authority for this proposition, and it is not supported by logic or reason. The common law flowage easement was born of practical necessity to ensure that neighbors did not flood each other. The duty it imposes is not dependent upon contract, rather it is proprietary, derived from the age old common law maxim "*sic utere tuo ut alienum non laedas*" (use your own property in such manner as not to injure that of another). See, *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 491, n.22 (1987).

St. Johns correctly points out that drainage of Modern's property depends upon use of NS-1 and the IRCC. However, contrary to its further assertion, the IRCC is, in fact, located on the Refuge. App. 60-67.

St. Johns fails to cite any authority for its argument that absent a written instrument or prescription, an upper owner has no right to enter upon the property of the lower owner to maintain a drainage canal. This argument ignores the very nature of easements, which axiomatically include the ancillary rights to enter upon the property of another in order to maintain the easement. The Titusville Fruit and Farmlands developer, in the exercise of its common law flowage easement, constructed the Drainage Canal System to serve nearly 10,000 acres of subdivided lots. Under St. Johns' theory, each time the developer subsequently sold a lot, the common law flowage easement rights inhering in the drainage canal system were extinguished leaving the lot owner without the rights to use and maintain the very drainage canals that the economically beneficial use of his or her lot depended. The law does not countenance such absurd, unreasonable consequences.

St. Johns' reliance upon *Gus Machado Buick, Inc. v. Westland Skating Ctr., Inc.*, 523 So.2d 959 (Fla. 1989) for the proposition that a lower owner is not obligated to maintain a ditch on its property to accelerate the flow for the benefit of the upper owner is misplaced. First, *Westland*, which adopted the "reasonable use" rule, is a tort rule governing disputes between upper and lower owners of ***developed*** lands.

It does not apply to vacant, undeveloped lands in their natural state whose only improvements are several access roads and drainage ditches constructed in the exercise of common law flowage easement rights. *Id.* at 962-63; Frank E. Maloney et al., *Water Law and Administration: The Florida Experience*, 204-05 (1968) (available at http://www.uflib.ufl.edu/ufdc/?b=WL00004983&v=0000). Second, the Court in *Westland* expressly acknowledged that "the principle that an upper owner enjoys ***an easement*** across the lower tract for all naturally occurring water ***continues to apply to land in its natural state***." 523 So.2d at 963.

St. Johns' common law flowage easement theory, if accepted, would transform Florida's common law flowage easement from a right of the upper owner to drain his or her property onto the lower owner's property into a right of the lower owner to flood the upper owner in order to restore and preserve wetlands on the lower owner's property. Such transformation is only constitutionally permissible if accompanied by compensation. See, *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922) ("When ... [the] seemingly absolute protection [of the Fifth Amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." 260 U.S. at 414).

CONCLUSION

Pursuant to the Swamp Lands Act of 1850 the Federal government conveyed to the State of Florida 20.4 million acres of "Swamp and Overflowed" lands – nearly two-thirds of all the land in Florida – for the purpose of facilitating their sale, drainage and development. See, *Everglades Sugar & Land Co. v. Bryan*, 87 So. 68, 73 (1921). Contemporaneously therewith, Florida courts adopted a modified version of the civil rule recognizing a common law flowage easement that includes the upper owner's right "by ditches and drains, to drain land into the natural and usual channels even though the quantity cast upon the lower owner is greatly increased." *Edason v. Denison*, 194 So. 342 (Fla. 1940); Maloney and Plager at 206-07; *Brumley v. Dorner*, 83 So. 912, 914 (Fla. 1919); *Libby v. Roberts*, 110 So. 82 (Fla. 1959); *Pearce v. Pearce*, 97 So.2d 329 (Fla. Dist. Ct. App. 2d Dist. 1957); *Seminole County v. Mertz*, 415 So.2d at 1289, 1286 (Fla. Dist. Ct. App. 5th Dist. 1964). Where, as here, a drainage canal system is constructed in the exercise of these rights, a successor upper owner has a right to rely upon the system, *Drake v. Walton County*, 6 So.3d 717, 720 (Fla. Dist. Ct. App. 1st Dist. 2009), and to maintain not only the portions of the system located on his or her property, but also those located on the lower owner's property, in a condition sufficient to carry off water flowing into it so as not to over-flow the upper owner's land. The rights of maintenance of such easement are ultimately "too elementary to require citation to authorities." *Fleming v. State Road Dept.*, 25 So.2d 376, 379 (Fla. 1946).

Modern has accepted the propriety of St. Johns' interference with its right to abate the flooding of its property, and instead seeks compensation for the continued physical invasion of its property by floodwater that it has the proprietary right to be rid of. Both the district court and the Eleventh Circuit have effectively ignored Modern's claim. In so doing, they overlook this Court's admonition in *Pennsylvania Coal*, that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. at 414. St. Johns' desire to restore and preserve previously drained wetlands on the St. Johns National Wildlife Refuge does not warrant short-cutting the Florida Constitution by use of its regulatory powers to perpetuate the flooding of Modern's property without payment of compensation. This Court should grant review to remedy the district court's and Eleventh Circuit's failure to enforce *Pennsylvania Coal's* mandate.

Respectfully submitted,

*DAVID SMOLKER
**Counsel of Record*
ETHAN J. LOEB
MATHEW C. LUCAS
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 E. Kennedy Blvd., Suite 200
Tampa, Florida 33602
813-223-3888
Attorneys for Petitioners

November 11, 2009

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INCORPORATED, a Florida Corporation and FIRST OMNI SERVICE CORPORATION, a Florida Corporation,

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.
_____/

Case No.: 6:03-CV-718-ORL-31DAB

FOURTH AMENDED COMPLAINT

(Filed May 17, 2004)

PLAINTIFFS, MODERN, INCORPORATED ("MODERN") and FIRST OMNI SERVICE CORPORATION ("FIRST OMNI"), (collectively the "PLAINTIFFS"), through their undersigned counsel, hereby sue DEFENDANTS, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION ("FDOT"), ST. JOHNS RIVER WATER MANAGEMENT DISTRICT ("ST. JOHNS"), and UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS"), and aver:

The Parties

1. MODERN is a Florida corporation whose principal place of business is located in Brevard County, Florida.

* * *

31. FDOT, by its above-described actions, has caused the continuous or frequent physical invasion of PLAINTIFFS' drainage easements and the impoundment of surface waters on the Property so as to flood the Property and so as to raise the groundwater on the Property, the effect of which is to deprive PLAINTIFFS of the economically beneficial use of its Property and its appurtenant drainage easements.

32. ST. JOHNS, by its above-described actions, has authorized the continuous or frequent physical invasion of PLAINTIFFS' easements and the impoundment of surface waters on the Property so as to flood the Property and so as to raise the groundwater on the Property the affect of which is to deprive PLAINTIFFS of the economically beneficial use the Property and appurtenant drainage easements.

The Flooding

33. PLAINTIFFS first began to discover the effects of the FDOT and ST. JOHNS actions in 1995 and 1996. They immediately began efforts to alleviate the problem and prevent future flooding.

34. From 1996 to 1997, PLAINTIFFS attempted to negotiate with ST. JOHNS and FDOT to abate the flooding. ST. JOHNS rejected any possibility of restoring the Drainage System to its pre-filled condition so as to prevent flooding of the Property.

35. In February of 1997, the PLAINTIFFS cleaned out portions of several ditches within the Drainage System bordering the Property in order to relieve the flooding. PLAINTIFFS did so based on the good-faith belief that this activity did not require a permit from St. Johns under chapters 373 or 403, Florida Statutes (2003), because such activity was considered exempt maintenance of an existing drainage ditch.

36. After discovering PLAINTIFFS' maintenance activities, ST. JOHNS, at the request of USFWS, issued an emergency order directing that PLAINTIFFS cease clearing out the drainage ditches (the "Emergency Order") within the Drainage System.

37. The Emergency Order authorized USFWS to place two earthen weirs within portions of the Drainage System that bordered MODERN's property. The weirs were intended to prevent the flow of surface water off of the Property that historically drained from the Property, through the Refuge, and into the St. Johns River.

38. On August 20, 1997, ST. JOHNS filed an Administrative Complaint and proposed order requiring MODERN to undo all ditch maintenance which had [sic] **PLAINTIFFS previously had performed and required MODERN to permanently maintain water levels on the Property that exceed the 100 year flood elevation of the St. Johns River.**

39. The scope and magnitude of the flooding continues to increase and substantial portions of the Property are being converted from dry land to marshy wetlands which did not previously exist.

The Court Action

40. On May 19, 1997, PLAINTIFFS filed a complaint in the Eighteenth Judicial Circuit of the State of Florida in and for Brevard County, Florida, seeking damages for the flooding of the Property, inverse condemnation, and injunctive relief to prevent future flooding of the Property.

41. On January 9, 1998, the Circuit Court entered an order dismissing PLAINTIFFS' complaint and requiring PLAINTIFFS to exhaust their administrative remedies under Chapter 120, Florida Statutes (1998), before proceeding further. The Circuit Court subsequently entered an order holding the Circuit Court case in abeyance until that was accomplished.

42. The PLAINTIFFS have exhausted the administrative remedies as the Circuit Court required.

43. All conditions precedent to maintaining this cause of action has [sic] been met, excused, waived or have otherwise occurred.

England and _Jennings_ Reservation

44. The PLAINTIFFS specifically reserve their claim for inverse condemnation under the United States Constitution pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1994); *Fields v. Sarasota-Manatee Airport Authority*, 953 F. 2d 1299 (11th Cir. 1982) and *Jennings v. Caddo Parish School Board*, 531 F. 2d 1331, 1332 (5th Cir. 1976).

COUNT I

INVERSE CONDEMNATION AGAINST ST. JOHNS

45. PLAINTIFFS reallege and incorporate the allegations contained in paragraphs 1 through 44.

46. This is a cause of action for inverse condemnation against ST. JOHNS, and not against FDOT or USFWS, seeking full compensation for the taking of the Property.

47. ST. JOHNS, by its above-described actions, has authorized the continuous or frequent physical invasion of PLAINTIFFS'

easements and the impoundment of surface waters on the Property so as to flood the Property and so as to raise the groundwater on the Property the affect of which is to deprive PLAINTIFFS of the economically beneficial use the Property and appurtenant drainage easements.

48. ST. JOHNS's actions were intended to serve a public purpose.

49. ST. JOHNS has failed and refuses to pay full compensation for the taking resulting from its actions.

* * *

WHEREFORE, the PLAINTIFFS respectfully request this Court grant the following relief:

a. Enjoin ST. JOHNS and FDOT from interfering with PLAINTIFFS' use of the Drainage System to drain the Property;

b. Direct ST. JOHNS and FDOT to restore, or permit others to restore, the Drainage System so as to abate the flooding of the Property;

c. Award in PLAINTIFFS favor its costs of bringing this action; and

d. Such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

76. PLAINTIFFS hereby demand trial by jury on all issue so triable.

BRICKLEMYER SMOLKER
& BOLVES, P.A.

By: /s/ Ethan Loeb

David Smolker
Fla. Bar No. 349259
Matthew C. Lucas
Fla. Bar No. 344834
Ethan J. Loeb
Fla. Bar No. 668338
500 East Kennedy Boulevard,
Suite 200
Tampa, Florida 33602
(813) 223-3888
Attorneys for PLAINTIFFS
MODERN, INC. and FIRST
OMNI SERVICE CORP.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INC., a Florida Corporation and FIRST OMNI SERVICES CORP., a Florida Corporation

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants. /

Case No.: 6:03-CV-718-ORL-31DAB

RESPONSE TO DEFENDANTS, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT AND FLORIDA DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS

(Filed Nov. 18, 2003)

Plaintiffs, Modern, Inc. ("Modern") and First Omni Services Corporation ("First Omni") (collectively the "Plaintiffs"), through their undersigned counsel, and pursuant to Middle District of Florida Local Rule 3.01(b) (2002), hereby collectively responds to the Motions to Dismiss filed by Defendants, St. Johns River Water Management District ("St. Johns") (Dkt. 47, 50) and the Florida Department of

Transportation ("FDOT") (Dkt. 51-52) (collectively the "Defendants"). In support hereof, the Plaintiffs show the following:

1. **Factual and Procedural History.**

This case arises from the Plaintiffs' maintenance dredging of a canal system that has historically drained their properties, both of which are located within the St. Johns River basin

* * *

d. Ripeness.

Based upon nothing more than a purported failure to apply for a permit, St. Johns argues that the Plaintiffs' claim for inverse condemnation is not yet ripe for judicial review. This assertion ignores the very essence of the Plaintiffs' takings claims. The Plaintiffs are not seeking relief for denial of a regulatory permit. They are seeking relief for the physical invasion of their property interests through government actions that authorized or resulted in ongoing physical invasion of Plaintiffs' property interests.

Once a physical invasion occurs, as has been alleged, a landowner is not required to "ripen" its taking claim through further administrative process before suing in court.

As the U.S. District Court for the Northern District of Texas stated:

> ***Where there has been a physical invasion, the taking occurs at once***, **and nothing the city can do or say after that point will change that fact.** ***Hall v. City of Santa Barbara*****, 833 F.2d 1270, 1281 n. 28 (9th Cir. 1986),** ***overruled on other grounds*** **by** ***Yee v. City of Escondido*****, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). The alleged flooding of surface water onto [plaintiff's] land, the extension of the drainage pipe beyond [the defendant's] easement, and the damage to her house, land, swimming pool, trees, shrubbery, and ground cover all constitute a physical invasion of her property. As a result, a taking has been alleged, satisfying the first prong of the** ***Williamson County*** **ripeness test.**[8]

Milliken v. Town of Addison**, 2002 WL 31059802, * 2 (N.D. Tex. 2002) (emphasis added),** ***see also Loretto v. Teleprompter Manhattan CATV Corp.*****, 458 U.S. 419, 426 (1982) ("Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, the character of the government action not only is an important factor in resolving whether the action works a taking but also is**

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[8] The second "prong" under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195 (1985) is that just compensation was not paid.

determinative") (internal quotations omitted).[9] In all events, then, the claims for inverse condemnation are ripe for review.

5. <u>Count V – the Equal Protection Claim – is Far Beyond the Purview of an Administrative Hearing; In all Respects, Count V States a Cause of Action.</u>

Applying *Key Haven,* Defendants assert that the Plaintiffs were required to raise any equal protection challenge before the district court of appeal. They are correct. *Key Haven* requires that a party raise and adjudicate any equal protection and substantive due process claims arising under state law from the administrative proceeding in the district court of appeal. However, a plaintiff may always reserve their federal constitutional claims resulting from agency action for adjudication before a federal district court. *See England,* 375 U.S. 411; *Fields,* 953 F.2d 1299; *Jennings,* 531 F.2d 1331. As the attached Exhibit "F" reveals, the Plaintiffs made their *Jennings-England* reservation. The Defendants nonetheless argue that the federal equal protection claims fail to state a cause of action, and are barred by *res judicata* and collateral estoppel.

i. Failure to State a Cause of Action.

The Defendants assert that Plaintiffs "fail[ ] to allege intentional discrimination against plaintiffs." (Dkt. 50 at p. 25). St. Johns's only argument in this regard is that Plaintiffs did not specifically allege a "purposeful" intent to discriminate against them as

required under *Snowden v. Hughes*, 321 U.S. 1 (1944) and *GJR Investments Incorporated v. County of Escambia, Florida*, 132 F.3d 1359 (11th Cir. 1998). Although the word "purposeful" is not used in the Third Amended Complaint, there are more than ample allegations from which it can be inferred.

> 109. St. Johns's application of rules, policies, and actions related to the Plaintiffs' property is unfairly discriminatory when compared to the treatment that St. Johns accorded similarly situated property owners, including but not limited to:
>
> * * *

WHEREFORE, the Plaintiffs respectfully request this Court to deny the Defendants' Motions to Dismiss, or in the alternative Motions for Summary Judgment in total.

BRICKLEMYER SMOLKER
& BOLVES, P.A.

By: /s/ [Illegible]

David Smolker [FBN 174520]
Fla. Bar No. 349259
Matthew C. Lucas
Fla. Bar No. 344834
500 East Kennedy Boulevard,
Suite 200
Tampa, Florida 33602
(813) 223-3888
(813) 228-6422
Attorneys for PLAINTIFFS
MODERN, INC. and FIRST
OMNI SERVICE CORP.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded by United States mail this 17th day of November, 2003 to William H. Congdon, Esquire, Attorney for ST. JOHNS, Post Office Box 1429, Palatka, Florida 32178-1429; Walter Kelly, Esquire, Florida Department of Transportation, 605 Suwannee Street, Tallahassee, Fl 32399-0458; Samuel D. Armstrong, Assistant United States Attorney, 201 Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

By: /s/ [Illegible]
David Smolker

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INC., a Florida Corporation and FIRST OMNI SERVICES CORP., a Florida Corporation

Plaintiffs

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.
_____/

Case No.: 6:03-CV-718-ORL-31DAB

PLAINTIFFS', MODERN, INC, AND FIRST OMNI SERVICE CORPORATION'S AMENDED ANSWERS TO ST. JOHNS RIVER WATER MANAGEMENT DISTRICT'S FOURTH SET OF INTERROGATORIES

(Filed Jul. 27, 2006)

Plaintiffs, Modern, Incorporated and First Omni Service Corporation (collectively "Plaintiffs"), through their undersigned counsel, hereby amend their responses to St. Johns River Water Management District's ("St. Johns") Fourth Set of Interrogatories.

PRELIMINARY STATEMENT AND GENERAL OBJECTIONS

Plaintiffs' answers to St. Johns's interrogatories are limited to the extent said interrogatories exceed the permissible scope of discovery or seek information that is neither relevant to the subject matter of this action or reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs' answers to St. Johns's interrogatories are further limited to the extent said interrogatories seek to assume the truth of matters not established, or seek privileged information, proprietary information, confidential trade information, marketing information, or

* * *

1. For each permit issued by the District that you contend caused or contributed to flooding of the property that is the subject of this litigation, please:

(a) State permit number, permittee, and date of permit issuance.

(b) Describe as specifically as possible any statutory or rule provisions that you contend were not met.

(c) State each and every fact that supports your contention that the statutory (sic) or rule provisions were not met.

ANSWER:

(a) This interrogatory seeks information related only to permit issuance; however, the Plaintiffs, out of abundance of caution, provide the following supplemental information supporting its case against the St. Johns River Water Management District. Plaintiffs contend that under the Federal Rules of Civil Procedure, they have more than adequately revealed the acts that St. Johns has taken that have cause [sic] or contributed to the flooding of the Properties. This supplemental information is based on discovery, numerous depositions, and review of thousands of documents produced by the parties, which have revealed the full scope of the actions that constitute the claims against St. Johns.

Permit Number	Permittee	Date of Permit Issuance
4-009-0585AG-ERP	Brevard County	February 10, 1998
12-009-0080	Great Outdoors	November 13, 1990
1997 Emergency Order issued to USFWS	**USFWS**	**1997**

1997 Administrative Order from St. Johns River Water Management District and Administrative Complaint requiring Modern to fill NS-1 ditch and/or canal	N/A	1997
Hacienda Road 4-009-02986	FDOT	September 14, 1988
Exemption for Culvert in IRCC per John Juliana	Brevard County	September 25, 1996 October 9, 1996
4-009-0278	J. Eckerd	January 12, 1988
St. Johns's implementation of it nonstructural flood control program	N/A	1970's to present
St. Johns's Acquiescence in the United States Fish and Wildlife Service's filling in and plugging of ditches within the St. Johns	N/A	1970's to present

National Wildlife Refuge without requiring permits or without instituting an action to require them to restore the said ditches		
St. Johns's Establishment and implementation of the non-rule policy regarding exempt maintenance	N/A	Hal Wilkening Memorandum
St. Johns's seeking grossly excessive penalties and fines against Modern	N/A	2001
St. Johns's failure to require FDOT to maintain the failed State Road 50 underdrain system and adjacent ditches	N/A	Ongoing
St. Johns's failure to require FDOT to correct the failed State Road 50 underdrain system	N/A	Ongoing

St. Johns's collaborative effort with other environmental agencies to restore the marshes along the St. Johns's River.	N/A	Ongoing
St. Johns's promulgation and application of rules regarding exempt maintenance		

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN INC. and FIRST OMNI SERVICES CORP., both Florida corporations,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, St. Johns RIVER WATER MANAGEMENT DISTRICT and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.

CASE NO. 6:03-cv-718-Orl-31DAB

St. Johns RIVER WATER MANAGEMENT DISTRICT,

Third-Party Plaintiff,

v.

BREVARD COUNTY; THE GREAT OUTDOORS R.V./GOLF RESORT; AND ESTATE OF JACK ECKERD,

Third-Party Defendants. /

JOINT PRE-TRIAL STATEMENT

(Filed Jul. 5, 2006)

1. BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in this case is the quiet title claim against the United States of America, which was brought pursuant to 28 U.S.C. 2409a. The Court has supplemental jurisdiction over the state-law claims against St. Johns and FDOT pursuant to 28 U.S.C § 1367.

* * *

Emergency Order; and (iv) corrective actions required of plaintiff Modern by a St. Johns final order. A state appellate court affirmed the Emergency Order and the corrective action final order.

Plaintiffs Fourth Amended Complaint makes inverse condemnation claims against St. Johns (Count I) and FDOT (Count II), requests a declaratory judgment as to Plaintiffs' alleged drainage easement rights within the Refuge (Count III), seeks to quiet title under federal law against Fish and Wildlife as to Plaintiffs' alleged drainage easement rights within the Refuge (Count IV), and finally, in the alternative, demands permanent injunctive relief to prevent St. Johns and FDOT from interfering with the operation of the alleged drainage ditch system and requiring them to restore or permit others to restore the alleged drainage system so as to abate the alleged flooding of the Property (Count V)

3. STATEMENT OF EACH PARTY'S CASE

a. Plaintiffs' Statement of Case:

Modern and First Omni own property located at or near the interchange of I-95 and SR 50 in Brevard County, Florida contiguous with the City of Titusville to the east. Their properties are served by an extensive system of intersecting east-west and north-south drainage canals (the Drainage Canal System") that was constructed in the early 1900s to drain the 12,800 acre Titusville Fruit and Farm Lands Sub-division, which was platted in 1914. Portions of the Drainage Canal System collect and channel large amounts of upstream surface water drainage from the City of Titusville to the east, and disposes of the waters to the west through several east-west canals onto marshes on the Refuge and to the south through several north-south canals that discharge into the Addison Canal which in turn discharges west to the St. Johns River. These drainage canals also serve and are near, adjacent to or within Modern's and First Omni's properties. Reasonable improvement and enjoyment of their properties requires that Modern and First Omni drain the surface waters that naturally and artificially collect on the properties and within the canals adjacent to or on their properties as a result of regularly recurring rainfall and the upstream Drainage Canal System. Plaintiffs have the right under Florida law to dispose of these surface waters and to channelize and enhance the drainage of their properties in order to improve and enjoy them. These rights include the rights to maintain the canals

or ditches and to remove any obstructions, whether man-made or naturally occurring, within those portions of the Drainage Canal System reasonably necessary to adequately drain and prevent flooding of their properties by both natural and artificial drainage. If the obstructions to this portion of the Drainage Canal System are not removed and the canals not maintained, the natural and artificial drainage impounds within and overflows the canals, thereby raising water table elevations and flooding or increasing the frequency, magnitude and duration of flooding of all or portions of Modern's and First Omni's properties such that they remain flooded for prolonged periods of time especially during the wet season.

Plaintiffs contends [sic] that FDOT, **St. Johns and** USFWS, by their various activities and conduct, in whole or in part, have: **(i) caused and continue to cause and perpetuate flooding of Plaintiffs' properties that results from increased groundwater elevations and frequent and prolonged inundation from rainfall and (ii) have increased the magnitude, frequency and duration of such flooding. Plaintiffs further contend that these conditions are will** [sic] **continually reoccur in the future so as to permanently appropriate all or portions of Plaintiffs' properties.**

Discovery in this case reveals that the full scope of Defendants' conduct and activities effusing and or contributing to flooding of the Property includes: (i) implementation and enforcement by USFWS and St. Johns and facilitation by

FDOT of official policies and practices of eliminating existing Drainage Canal Systems that drain the floodplain of the St. Johns River by plugging and filling them in or authorizing or acquiescing in such plugging and filling-in, all in order restore the natural drainage pattern to the previously drained marshes and to restore their water levels and allow them to flood; (ii) FDOT's design, engineering, permitting, construction and maintenance of I-95 and SR 50, implementation of the Hacienda Road mitigation plan, its design of and failure to maintain or remedy the dysfunctional SR 50 underdrain system, and its filling in as part of the widening of SR 50 of "Various connections between the IRCC and several of the north-south ditches; (iii) **St. Johns'** issuance of permits for SR 50 widening, for the Hacienda Road mitigation plan and for other drainage works in the area, its **issuance of the Emergency Order and Administrative Complaint and Order having the effect of preventing Plaintiffs from cleaning out and removing the obstructions within the EW-1 and NS-1 drainage canals that are causing and or contributing to the flooding of Plaintiffs' properties, its implementation and enforcement of non-rule policy and its subsequent adoption of formal rules having the effect of extinguishing Plaintiffs' common law and statutory rights of exempt canal or ditch maintenance to original design specifications thereby, as a practical matter, effectively preventing Plaintiffs from maintaining the portions of the Drainage Canal System, including NS-1 and**

EW-1 and EW-1½ necessary to abate the flooding of their properties, its seeking of fines and penalties against Modern that are draconian and wholly out of proportion to the severity of the consequences of Modern's excavation of NS-1 and EW-1 canals in order to punish Modern and discourage Plaintiffs from exercising their rights to drain their properties under the law even though Modern has fully complied with the terms of the Administrative Complaint and Order by restoring EW-1 and NS-1 to its alleged pre-excavation condition., and its failure to require that the dysfunctional underdrain system of SR 50 be corrected by FDOT.

Plaintiffs contend that the flooding constitutes an enjoinable trespass and rises to the level of taking requiring compensation pursuant to Article 10, section 6 of the Florida Constitution. Plaintiff [sic] further contends that their properties enjoy appurtenant drainage rights in the portions of the Drainage Canal System on, adjacent to and in the vicinity of their properties necessary to adequately drain their properties, including, but not necessarily limited to canals known as EW-1, EW-1½, NS-1, NS-2 and the Indian River City Canal ("IRCC"). These drainage rights include: (1) public drainage easements by common law dedication; (2) private implied easements by plat; (3) private express easements by plat; (4) private express easements by deed; (5) private implied easement by virtue of the so-called "SunCharm Transaction"; and **(6) private common law flowage easements. Plaintiffs contend that**

FDOT and St. Johns, by their activities and conduct, have in whole or in part, permanently interfered and by so doing have taken these rights.

Plaintiffs further contend that with regard to Defendants remaining affirmative defenses that:

(i) issuance of permits to facilitate drainage of Plaintiffs' properties is not a defense to a flooding claim that involves a physical invasion or governmental actions that cause, contribute to, authorize, perpetuate or prevent the abatement of a physical invasion;

(ii) the Reasonable Use Rule does not apply because (a) St. Johns has no standing to raise the defense and (b) even if it did, the rule does not permit the USFWS and FDOT to

* * *

b. For Defendants: At this time, Defendants do not anticipate offering any depositions into evidence

15. MOTION OR OTHER MATTERS THAT REQUIRE ACTION BY THE COURT

a. St. Johns River Water Management District's Motion for Summary Judgment.

b. St. Johns River Water Management District's *Daubert* Motion.

c. Florida Department of Transportation's *Daubert* Motion.

d. United States Fish and Wildlife Service's Motion for Summary Judgment.

e. Any motions that the parties will file on July 10, 2006.

16. MONEY DAMAGES

Because this case has been bifurcated, Plaintiffs will not be presenting proof to of money damages. If they prevail on the liability phase of this cause, then they will present evidence of damages at the second phase of this case.

BRICKLEMYER SMOLKER & BOLVES, P.A.

By: /s Ethan J. Loeb
David Smolker, Esq.
Fla. Bar No. 349259
Ethan J. Loeb, Esq.
Fla. Bar No. 668338
500 East Kennedy Boulevard, Suite 200
Tampa, Florida 33602
(813) 223-3888
(813) 228-6422 (fax)
Attorneys for Plaintiffs Modern, Inc. and First Omni Service Corp.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

By: /s Walter Kelly
Walter Kelly. Esq.
Florida Bar No. 0181697
605 Suwannee Street
MS 58
Tallahassee, Florida 32399-0458
(850) 414-5290
(850) 488-5264 (fax)
Attorneys For State of Florida Department of Transportation

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

By: /s William H. Congdon
William H. Congdon, Esq.
Florida Bar No.: 0283606
Stanley J. Niego, Esq.
Florida Bar No.: 0193830
4049 Reid Street
Palatka, Florida 32177
(386) 329-4314
(386) 329-4485 (fax)
Attorneys for St. Johns River Water Management District

UNITED STATES FISH AND WILDLIFE SERVICE

By: /s Samuel D. Armstrong
Samuel D. Armstrong, Esq.
Florida Bar No.: 363626
501 W. Church Street
Suite 300
Orlando, Florida 32805
(407) 648-7500
(407) 648-7588 (fax)
Attorneys for United States Fish and Wildlife Service

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INCORPORATED, a Florida Corporation and FIRST OMNI SERVICE CORPORATION, a Florida Corporation,

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.

Case No.: 6:03-CV-718-ORL-31DAB

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Third Party Plaintiff,

vs.

THE GREAT OUTDOORS PREMIER R.V./GOLF RESORT, INC. and BREVARD COUNTY,

Third Party Defendants. /

TRIAL BRIEF

(Filed Aug. 4, 2006)

Plaintiffs, Modern, Incorporated ("Modern") and First Omni Service Corporation ("First Omni") through their undersigned attorneys, submit their Trial Brief.

I. FACTS.

Modern and First Omni own property located at or near the interchange of Interstate 95 ("I-95") and State Road 50 ("SR 50") in Brevard County, Florida at the western edge of the City

* * *

656-657 (Fla. 2d DCA 1958); Bruce & Ely, *supra* at ch. 4, § 4.03[2]. A claimant must also show that the claimed easement was continuous, apparent, and necessary at the time there was unity of title. *Kirma*, 102 So. 2d at 657. An implied easement is continuous if it is apparent. *Id*. An implied easement is apparent if it is visible or might be visible through reasonable inspection. *Id*. If continuous and apparent, the claimant must finally show that the specific right was necessary for the complete enjoyment of the estate granted or reserved once severed. *Id*. At the time of the Sun Charm transaction, the drainage ditches existed through the lots that were conveyed and the lots that were reserved. There was severance. The ability to use the drainage ditches between the lands that were conveyed and the lands that were reserved

was necessary to enjoy the conveyed parcels. Likewise, the reserved parcels needed the drainage ditches to the west, which were located on the conveyed parcels, to keep lands dry. The drainage ditches were apparent to the public, and obviously to the grantors and grantees.

(2) Taking

Flooding of private property caused by government conduct or activities is the quintessential *per se* physical invasion taking. *Pumpelly v. Greenbay*, 13 Wall (80 US) 166, 181 (1871) (invasion of real estate by superinduced additions of water or by having artificial structure placed on it so as to effectually destroy or impair its usefulness is a taking within the meaning of the U.S. Constitution).[4] For flooding

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[4] ***See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-428 (1982) (discussing U.S. Supreme Court treatment of flooding and other physical invasion taking cases, stating that these cases emphasize that physical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking, and concluding that where the "character of the governmental action . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner"); *Storer Cable T.V. of Florida v. Summerwinds Apartments Associates, LTD*, 493 So. 2d 417 (Fla. 1986) (statute allowing tenants to have cable television**

(Continued on following page)

resulting from government conduct or activity to rise to the level of a compensable taking, it must constitute an actual, permanent physical invasion of land amounting to an appropriation, rather than mere injury to property. *Kendry v. State Road Dept.*, 213 So. 2d 23 (Fla. 4th DCA 1986). According to the Fifth District Court of Appeal in *Associates of Meadow Lake, Inc. v. City of Edgewater*:

> [t]here is no absolute rule regarding the magnitude or duration of flooding necessary to constitute a taking. It is generally recognized that a single flood of short duration or occasional temporary flowage, is not sufficient to constitute a taking. Conversely, substantial periodic flooding, coupled with a likelihood of recurrence, has been held to constitute a taking . . . Most formulations of the rule speak of *permanent* invasions, even though "predictable periodicity" appears to be an acceptable substitute for "permanency."

706 So. 2d at 51 (quoting with approval § 606[2][c], *Nichols on Eminent Domain*).

Flooding is considered permanent if the rainfall conditions causing it are reasonably expected to continually recur in the future. *Kendry*, 213 So. 2d at 27; *Elliott v. Hernando County*, 281 So. 2d 395 (Fla. 2d DCA 1973); *Hillsborough County v. Gutierrez*, 433 So. 2d 1337 (Fla. 2d DCA 1983). A wide variety of

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within their homes at landlord's behest constituted a taking).

governmental conduct and actions resulting in permanent flooding have been held to by Florida courts to constitute a taking.[5] Under Florida law, where the conduct of two or more entities combines to cause flooding, they are held to be jointly and severally liable for the total injury regardless of the extent of each individual's contribution to the flooding, and even if none of the government's actions, considered individually, unconstitutionally infringed on property rights. *Anhoco Corp. v. Dade County*, 144 So. 2d 793, 796 (Fla. 1962); *Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561, 568-69 (Fla. 4th DCA 2002). In

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[5] *See State Road Dept. v. Tharp*, 1 So. 2d 868 (Fla. 4th DCA 1941) (state road department's partial filling of stream that raised water levels so as to reduce capacity of millrace thereby decreasing by 50% the capacity of water powered mill); *Brevard County v. Blasky*, 875 So. 2d 6 (Fla. 5th DCA 2004) (county's construction and maintenance of dike and dam that flooded marshy lands for mosquito control); *Martin v. City of Monticello*, 632 So. 2d 236 (Fla. 1st DCA 1994) (city's discharge of more than one inch of treated sewage effluent); *Leon County v. Smith*, 397 So. 2d 362 (Fla. 1st DCA 1981) (city's approval of subdivision plat, acceptance of ownership and maintenance of drainage system within subdivision and interconnection of drainage system with upstream drainage system); *Associates of Meadow Lake*, 706 So. 2d at 50 (city's construction of park without properly functioning drainage system); *South Florida Water Management District v. Steadman Stahl P.A. Pension Fund*, 558 So. 2d 1087 (Fla. 4th DCA 1990) (water management district's change in policies regarding maintenance of its water management structures); The courts in other jurisdictions have held that obstructions of or failure to maintain drainage canals causing overflows and flooding of property states a claim for a taking requiring compensation. *Bauer v. County of Ventura*, 289 P.2d 1 (Ca. 1955); *Mattoon*, 617 P. 2d at 1347, 1350.

establishing joint and several liability, a plaintiff does not bear the burden to establish the relative contributions of the government actors to the overall flooding problem. *Celotex Corp. v. Copeland,* 471 So. 2d 533, 536-38 (Fla. 1985). Rather, it is defendant's burden.[6]

(3) Public Purpose

FDOT is an agency of the State of Florida authorized pursuant to chapters 334, 335, 337 and 338, Florida Statutes, to plan, design, engineer, finance, construct, operate and maintain the public roads that comprise the Florida State Highway System, including I-95 and SR 50 in Brevard County. It is undisputed that FDOT's actions alleged to cause or contribute to the flooding of the Properties were taken pursuant to this authority, and for a proper public purpose.

St. Johns is a water management district created pursuant to chapter 373, Florida Statutes, to, among other things: (i) regulate and manage surface water

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[6] It is difficult to apportion flooding damages as between the Defendants in this case since their actions result in both concurrent and successive causation producing Plaintiffs' total injuries. *See McLeod v. American Motors Corp.*, 723 F. 2d 830 (11th Cir. 1984). Where liability is reasonably apportionable, it should be apportioned between the defendants. If not reasonably apportionable, each defendant is fully liable to the plaintiff. *Id.* Each defendants' separate contribution to the flooding and it is difficult if not impossible to apportion.

and related resources, including water levels in drainage works; (ii) adopt and enforce policies and rules and issue permits and orders relating to surface water management systems; maintain administrative and judicial enforcement actions; and acquire, condemn and manage real property. §§ §§ 373.016, .086(1), .069(1), .086(1), .103(1), .103(4), .119, .129, .136, .139, .191, .171, .418, & .413, Fla. Stat. **It is undisputed that St. Johns' conduct and activities actions alleged to cause or contribute to the flooding of the Properties were taken pursuant to this authority and for a proper public purpose.**

(4) **Compensation**

It is undisputed that FDOT and St. Johns have failed and refuse to compensate Plaintiffs for their claimed takings.

V. PLAINTIFFS' INJUNCTION CLAIM

Under Florida law, injunction will lie in favor on a landowner to prevent or abate flooding caused by another under a trespass theory. A party seeking injunctive relief against the government for flooding must prove that (i) the harm that will occur as a result of the flooding is irreparable; (ii) that the landowner has a clear legal right to the relief sought; (iii) that the landowner lacks an adequate remedy at law; (iv) that the requested injunction would not be contrary to the interest of the public. *Weekley v. Pace*

Assembly Ministries Inc., 671 So. 2d 220, 220 (Fla. 1st DCA 1996). The Fifth District Court of Appeals holds that a party cannot recover for injunctive relief against the government for a permanent flooding because inverse condemnation constitutes an adequate remedy at law. *DiChristopher v. Board of County Com'rs*, 908 So. 2d 492, 498 (Fla. 5th DCA 2005). The holding arguably does not apply to an injunction for flooding of a temporary character. Thus, a landowner seeking inverse condemnation based on flooding is entitled to seek injunctive relief in order to secure his or her ability to abate flooding if the court does not grant the relief in inverse condemnation because the flooding had already occurred before the landowner acquired title in the subject property. *See Department of Transp. v. Burnette*, 384 So. 2d 916 (Fla. 1st DCA 1980).

VI. DEFENDANTS DEFENSES

In response to the claims asserted above, Defendants have asserted certain affirmative defenses, including (i) exhaustion of administrative remedies due to failure to apply for permit to cure flooding; (ii) sovereign immunity; (iii) failure to state cause of action on grounds that St. Johns can't be liable for issuance of permits; (iv) reasonable use; (v) statutory immunity; (vi)

* * *

reliance upon the representation by the party claiming the estoppel; and (iii) a change in the position of

the party claiming the estoppel to his detriment. *Jewitt v. Leisinger*, 655 So. 2d 1210, 1212 (Fla. 4th DCA 1995). The United States has produced no evidence to date establishing any of the elements of an equitable estoppel as against Plaintiffs.

(8) Laches

Laches is an affirmative defense based on unreasonable delay in enforcing a right coupled with a disadvantage to the person against whom the right is sought to be asserted. *George G. Sharp, Inc. v. Doric Marine, Inc.*, 544 So. 2d 228 (Fla. 3d DCA 1989). The doctrine of laches has been legislatively modified by section 95.11(6), Florida Statutes (2006), and as such, laches will not bar a claim if the statute of limitation has not run unless there is a strong showing in equity that it should apply. *Smith v. Branch*, 391 So. 2d 797, 798 (Fla. 2d DCA 1980). For the reasons previously discussed, the statute of limitations did not run as against Plaintiffs' easement claims, its inverse condemnation or trespass claims. Where a party is claiming laches before the requisite statute of limitation has run, he or she must prove "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *McCray v. State*, 699 So. 2d 1366, 1368 (Fla. 1997) (internal citations and quotations omitted). This defense must be proven by clear and positive evidence. *Smith*, 391 So. 2d 797; *Peacock v. Firman*, 177 So. 2d 560 (Fla. 3d DCA 1965); *Wagner v. Moseley*, 104 So. 2d 86 (Fla. 2d DCA 1958). To date, the United States has

not produced any evidence of lack of diligence on the part of Plaintiffs or that it would be in anyway prejudiced.

Respectfully submitted,

BRICKLEMYER SMOLKER & BOLVES, P.A.

By: /s/ Ethan J. Loeb

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MODERN, INCORPORATED, a Florida Corporation and FIRST OMNI SERVICE CORPORATION, a Florida Corporation,

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.

Case No.: 6:03-CV-718-ORL-31DAB

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Third Party Plaintiff,

vs.

THE GREAT OUTDOORS PREMIER R.V./GOLF RESORT, INC. and BREVARD COUNTY,

Third Party Defendants.

PLAINTIFFS' CLOSING STATEMENT

(Filed Jul. 30, 2007)

Plaintiffs, Modern, Incorporated ("Modern") and First Omni Service Corporation ("First Omni") (collectively, the "Plaintiffs"), through their undersigned attorneys, hereby submit their Closing Statement.

* * *

The Titusville Fruit and Farm Lands Company completed construction of the Drainage Canal System in 1914. (T. 699). Aerial photographs from 1943, 1958, and 1969 show the Drainage Canal System in a robust condition (Pl. Ex. A251, 252, 253, 254), which is far beyond the 20-year prescriptive right requirement under Florida law, and since then the landowners within the Plat and the general public have used the ditches to drain their lands to the present day. (T. 702, 706-08; Pl. Ex. A147, 251, 252, 253, 254). Most of the Drainage Canal System was located within the areas designated "road" on the plat; however, there were some instances where the Drainage Canal System was located adjacent to these designated areas. In either instance, the Drainage Canal System existed for the requisite twenty year time period, and the use was open to the USFWS as evidenced by the Baker Study Map (Pl. Ex. A-16), the USFWS acquisition map (Pl. Ex. A284), USFWS documentation (Pl. Ex. A18, 22, 147), and the testimony of Mr. Leenhouts (T. 505-11) and Mr. Pointevett (T. 1494). All of the elements for prescription have

been met; Plaintiffs are entitled to a judgment under the theory of prescriptive easement.

It remains to only note that a party cannot typically prescriptively acquire easement interests against the government. While prescription cannot be made against the government during its ownership, a landowner can acquire prescriptive rights over lands before the government acquires said lands. Such is the case here, and prescriptive easements exist.

b. Taking.

Under Federal and Florida law, government action that results in or authorizes a permanent physical occupation or invasion of property, however minimal, constitutes a *per se* taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The United States Supreme Court has clearly held that a taking is readily found where an owner is compelled to suffer *any* permanent physical invasion of property by flooding. *Pumpelly v. Greenbay*, 80 U.S. (13 Wall) 166, 181 (1871).[29] To rise to the level of a compensable taking, flooding must constitute an actual, permanent physical invasion of land amounting to an

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[29] *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-428 (1982); *Storer Cable T.V. of Florida v. Summerwinds Apartments Assocs., LTD*, 493 So. 2d 417 (Fla. 1986); *Aspen-Tarpon Springs Limited v. Stuart*, 635 So. 2d 61 (Fla. 1st DCA 1994)

appropriation, rather than mere injury to property. *Kendry v. State Rd. Dept.*, 213 So. 2d 23 (Fla. 4th DCA 1986). According to the Fifth District Court of Appeal in *Associates of Meadow Lake Inc. v. City of Edgewater*:

> [t]here is no absolute rule regarding the magnitude or duration of flooding necessary to constitute a taking. It is generally recognized that a single flood of short duration or occasional temporary flowage, is not sufficient to constitute a taking. Conversely, substantial periodic flooding, coupled with a likelihood of recurrence, has been held to constitute a taking . . . Most formulations of the rule speak of *permanent* invasions, even though "predictable periodicity" appears to be an acceptable substitute for "permanency."

706 So. 2d 50, 51 (Fla. 5th DCA 1998) (quoting with approval § 606[2][c], *Nichols on Eminent Domain*).

Flooding is considered permanent if the rainfall conditions causing it are reasonably expected to continually recur in the future. *Kendry*, 213 So. 2d at 27; *Elliott v. Hernando County*, 281 So. 2d 395 (Fla. 2d DCA 1973); *Hillsborough County v. Gutierrez*, 433 So. 2d 1337 (Fla. 2d DCA 1983). A wide variety of governmental conduct and actions resulting in

permanent flooding have been held to by Florida courts to constitute a taking.[30]

The most relevant case addressing the takings clause and water management district policy decisions is *South Florida Water Management District v.*

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[30] *See State Rd. Dept. v. Tharp,* 1 So. 2d 868 (Fla. 4th DCA 1941) (state road department's partial filling of stream that raised water levels so as to reduce capacity of millrace thereby decreasing by 50% the capacity of water powered mill); *Brevard County v. Blask*, 875 So. 2d 6 (Fla. 5th DCA 2004) (county's construction and maintenance of dike and dam that flooded marshy lands for mosquito control); *Martin v. City of Monticello,* 632 So. 2d 236 (Fla. 1st DCA 1994) (city's discharge of more than one inch of treated sewage effluent); *Leon County v. Smith*, 397 So. 2d 362 (Fla. 1st DCA 1981) (city's approval of subdivision plat, acceptance of ownership and maintenance of drainage system within subdivision and interconnection of drainage system with upstream drainage system); *Assocs. of Meadow Lake,* 706 So. 2d at 50 (city's construction of park without properly functioning drainage system); *South Florida Water Mgmt. Dist. v. Steadman Stahl, P.A. Pension Fund,* 558 So. 2d 1087 (Fla. 4th DCA 1990) (water management district's change in policies regarding maintenance of its water management structures); *Gutierrez,* 433 So. 2d at 1337 (county's approval of drainage plan and failure to ensure that drainage system constructed according to plan); *Elliott,* 281 So. 2d 395 (county's construction of road without adequate culverts by); *Dept. of Transp. v. Burnette,* 384 So. 2d 916 (Fla. 1st DCA 1980) (state road department's modification of highway drainage system over a period of years); *Kendry,* 213 So. 2d 23 (state road department's raising and widening of highway); The courts in other jurisdictions have held that obstructions of or failure to maintain drainage canals causing overflows and flooding of property states a claim for a taking requiring compensation. *Bauer v. County of Ventura,* 289 P.2d 1 (Ca. 1955); *Mattoon,* 617 P. 2d at 1347, 1350.

Steadman Stahl, P.A. Pension Fund, 558 So. 2d 1087 (Fla. 4th DCA 1990). In *Steadman Stahl,* the water management district maintained a water conservation area adjacent to the plaintiff's lands, and that the water management district elected to alter its policies concerning the land management practices for the said area. *Id.* at 1088. As a result of the change in policy, the plaintiff's lands flooded. *Id.* The landowner sued the water management district, and the Fourth District Court of Appeal concluded that the change in policy resulted in a taking of the plaintiffs' land. *Id.*

(i) St. Johns Has Compelled Modern to Suffer The Continued Physical Invasion of Its Property By Floodwater From Which Modern Has Rights To Be Free.

Ms. Skosberg's own analyses using Mr. Sprinkle's 1970s model, corrected for what she contends are its major errors, underscores the undisputed testimony of every drainage expert in this case. *The weirs in EW-1 and NS-1 and the 500 foot plug in NS-1 are causing flooding of Modern's properties.* This ultimate fact is beyond dispute and Defendant's do not contend otherwise. The issue is whether St. Johns by its actions or omissions has caused or is perpetuating the flooding. The testimony and evidence clearly establishes that St. Johns has and continues to compel Modern to suffer a physical

invasion of its property by floodwaters of which Modern has a right to be free. In so doing, St. Johns has effectively used its authority under chapters 373, Florida Statutes, and 403 Florida Statutes, to impress a flowage easement on Modern's property.

Specifically, St. Johns permitted the 4-laning of SR 50, including its dysfunctional drainage system, the filling in of NS-2 at the Great Outdoors entrance, and the Hacienda Road mitigation. St. Johns also has acquiesced in and failed to require removal of numerous known, unpermitted man-made blockages of the Drainage Canal System on the Refuge downstream of Modern's property and on Modern's property, including the 500 foot section of NS-1 on Modern's property into which an unknown party bulldozed the spoil bank around 1985-1986 timeframe. And, **after Modern cleaned-out NS-1 and EW-1 to their original design specifications to abate the flooding of its property caused by large amounts of naturally occurring upstream floodwater and artificial additions from the City of Titusville, St. Johns: (i) declared the draining of Pond 1 and the 600-800 acre area that would otherwise be drained by NS-1 and EW-1 to constitute a public emergency requiring immediate action to block such draining; (ii) ordered USFWS to install weirs in NS-1 and EW-1 effectively preventing Modern from utilizing EW-1 and NS-1 to drain the floodwaters; (iii) issued and enforced an Administrative Complaint and Order that required Modern to restore and**

maintain the illegally filled 500 foot long obstruction in NS-1 on Modern's property; (iv) formulated and applied non-rule policy that effectively imposed a moratorium on all types of exempt drainage canal maintenance thereby limiting Modern's options to maintain EW-1 and NS-1 to routine custodial maintenance (and no maintenance on the north 500 of NS-1); (v) formulated and applied non-rule policy that effectively extinguished Modern's ability to abate the floodwaters by performing routine custodial maintenance to the original design specifications of NS-1 and EW; (vi) after ultimately prevailing against Modern in administrative proceedings initiated by Modern regarding the Emergency Order, sought unreasonable, uncalled for, and draconian administrative fines and penalties against Modern in order to punish it; (iv) [sic] thereafter initiated and prosecuted an unnecessary civil enforcement action against Modern seeking unreasonable, uncalled for, and draconian, penalties and fines despite the fact that Modern had indicated prior to the filing of the suit that it would comply with the Administrative Complaint and Order; (vii) [sic] failed to require USFWS to remove known obstructions the Drainage Canal System on the Refuge that are contributing to flooding of Modern's property; and (viii) [sic] failed to require that FDOT address its ill-designed and failed SR 50 drainage system that is impounding water north of SR 50. In short, St. Johns, in order to protect the wetlands and wildlife on the Refuge (like the policy decisions referenced in the *Steadman Stahl* case), **has used its authority to**

extinguish Modern's ability to abate flooding by lawfully maintaining the drainage canals. In so doing, St. Johns has impressed a permanent flowage easement on Modern's property.

The effect of St. Johns's actions and omissions is to compel Modern to suffer the continued physical invasion by floodwaters, and to leave Modern with no option to abate the flooding other than to apply for an ERP permit. Any ERP permit – which St. Johns did not bind themselves to approve – if approved, would require Modern to construct, at its expense, an elaborate drainage work-around likely requiring use of offsite lands that Modern neither owns nor has any rights in and which will likely cost millions of dollars to construct in addition to the millions of dollars in mitigation costs.

As the United States Supreme Court held in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), the protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. *Id.* at 415. The Court stated further a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the

Constitution of the United States." *Id.* "The general rule at least is that while property may be regulated to a certain extent, if regulation goes to [sic] far it will be recognized as a taking." *Id.* at 416. ***St. Johns has gone too far.***

ii. FDOT Is Liable For Taking Modern's Property By Contributing To The Causes of The Flooding.

The only real disputed issue is whether the secondary obstructions attributable to FDOT are contributing to the flooding of the Properties. The testimony and evidence, taken as a whole, establishes that these other obstructions are contributing to the flooding to some degree. The testimony of Mr. Sprinkle, Mr. Brown, Ms Skosberg and Mr. Llewelyn taken in its totality establishes that the canal filling west of Hacienda Road associated with FDOT's wetland mitigation has little effect, ***provided that the risers in the culverts at Hacienda Road are not in place.*** (T. 853). Mr. Sprinkle, Mr. Brown, and Ms. Skosberg all agreed that if the risers in the culverts at Hacienda Road are fully extended, Hacienda Road becomes the control elevation for upstream flooding. It averages elevation 14 feet, which means that floodwaters will translate

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enclosed, the land may still be adversely possessed when it is usually cultivated or improved. Section 95.18(2)(b), Florida Statutes.

USFWS offered no evidence that it paid property taxes for the right of ways or the drainage ditches. As a matter of law, the adverse possession defense fails. Assuming USFWS did pay taxes, its defense still fails because it never created a perimeter fence around the entire Refuge, across the drainage ditches, and plant crops for agricultural purposes within the right of ways or the ditches. (T. 642-49). The adverse possession defense lacked supportive evidence; USFWS's defense must be rejected.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request final judgment in their favor on Counts I and II against St. Johns and FDOT, or alternatively, Count V, and Counts III and V against all Defendants.

Respectfully submitted,

BRICKLEMYER SMOLKER & BOLVES, P.A.

By: /s/ Ethan J. Loeb

David Smolker, Esq.
Fla. Bar No. 349259
Ethan J. Loeb, Esq.
Fla. Bar No. 668338
500 East Kennedy Boulevard,
Suite 200
Tampa, Florida 33602
(813) 223-3888
(813) 228-6422
Attorneys for Plaintiffs,
Modern, Inc. and
First Omni Service Corp.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this the 30th day of July, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: **William H. Congdon, Esq.** and **Stanley J. Niego, Esq.**, St. Johns River Water Management District, 4049 Reid Street, Palatka, FL 32177; **Walter Kelly, Esq.**, Florida Department of Transportation, 605 Suwannee Street, Room MS-58, Tallahassee, FL 32399-0458; **Samuel Armstrong**, Office of the U.S. Attorney, 501 West Church Street, Suite 300, Orlando, FL 32805; **Kevin A. Reek, Esq.** and **Michael Gay, Esq.**, Foley & Lardner, 111 North Orange Avenue, Suite 1800, Orlando, FL 32801; **Scott L. Knox, Esq.** and **Morris Richardson, Esq.**, Office of the Brevard County Attorney, 2725 Judge Fran Jamieson Way, Building C, Suite 308, Viera, FL 32940.

s/ Ethan J. Loeb
Florida Bar No.: 0668338

No. 08-11799-E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MODERN, INCORPORATED, a Florida Corporation, and FIRST OMNI SERVICE CORPORATION, a Florida Corporation,
Appellants,
v.
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and UNITED STATES FISH AND WILDLIFE SERVICE,
Appellees.

ON APPEAL FROM THE DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION
Civ. Action No. 6:03-CV-718-ORL-31DAB
HON. GREGORY A. PRESNELL

INITIAL APPELLATE BRIEF

David Smolker
Ethan J. Loeb
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 East Kennedy Boulevard, Suite 200
Tampa, Florida 33602
(813) 223-3888/(813) 228-6422 facsimile
Attorneys for Appellants

* * *

Under Florida law, it is not necessary that government actually directly cause or create the condition that results in flooding. It is enough that they approve or authorize the activities of others that result in the flooding. *See Hillsborough County v. Gutierrez*, 433 So. 2d 1337 (Fla. 2d DCA 1983) (government failed to enforce the drainage plan it had approved for development of property by a third party that resulted in flooding).[14] Moreover, Florida precedent permits inverse condemnation actions for the taking of a flowage easement.[15]

B. The Effect Of St. Johns' Activities And Conduct Was And Is To Authorize And Compel Modern To Suffer The Continued Physical Invasion Of Its Property By Upstream Floodwaters And To Interfere With Its Common Law Flowage Easement

It is undisputed that Modern's property is being flooded. The District Court found that "the biggest contributing factor to the flooding is the blockage of

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[14] *Also see, Frustuck v. City of Fairfax*, 28 Cal. Rptr. 357, 363-63 (Cal. Ct. App. 1963; *Banks v. United States*, 69 Fed. Cl. 206, 212 (2006); *Harris County Flood Control Dist. v. Adam*, 56 S.W. 3d 665, 668-69 (Tx. Ct. App. 2001); *but see Phillips v. King County*, 968 P.2d 871 (Wash. 1998).

[15] *See Bensch v. Metro. Dade County*, 952. F. Supp. 790, 796 (S.D. Fla. 1996), citing *Anderson v. Bell*, 433 So. 2d 1202 (Fla. 1983) and *Leon County v. Smith*, 397 So. 2d 362 (Fla. Dist. Ct. App. 1st Dist. 1981).

NS-1 and EW-1 at or near the intersection of EW-1 and NS-1" and that "the excavation of NS-1 and EW-1 [is] enough to effectively drain Modern's property." (Doc. 458 at 268 & n. 27). It is beyond meaningful dispute: (i) that after Modern maintained NS-1 and EW-1 by excavating them to in order to abate the flooding of its property, the property was effectively drained; (ii) that St. Johns exercised its authority under chapter 373, Florida Statutes, to authorize installation of the weirs by USFWS and to require that Modern restore and maintain the blockages in NS-1 and EW-1; (iii) that these blockages result in continued regularly recurring flooding of Modern's property; and (iv) that the conduct and activities of St. Johns effectively interfered with Modern's ability to immediately abate the flooding of its property by performing routine custodial maintenance of EW-1 and NS-1 to return them to their original design specifications.

The effect of St. Johns' activities and conduct was and is to authorize and compel Modern to suffer the continued physical invasion of its property by upstream floodwaters. These floodwaters include surface waters that are being collected, channelized, cast and impounded upon Modern's property. They include natural and artificial additions from the Refuge and the City of Titusville. These are floodwaters that St. Johns is requiring remain impounded on Modern's property and that Modern has the private common law proprietary right to collect, channel and discharge off

of its property using EW-1, NS-1, the IRCC and the culverts beneath Hacienda Road.

In sum, St. Johns, by its conduct and activities, has effectively used its authority under chapter 373, Florida Statutes, to impress a negative flowage easement on Modern's property for the benefit of the public in order to facilitate the restoration of the floodplain of the St. Johns River by the United States and to protect the wetlands and wildlife on the Refuge.

C. The District Court's Conclusion That St. Johns' Conduct and Activities Could Not Be The Legal Cause of Any Taking Is Erroneous

The District Court concluded, as a matter of law, without citation to authority, that St. Johns was not liable for a taking because installation of the weirs in EW-1 and NS-1 and filling in of 500 feet of NS-1 "merely reestablished the status quo as it existed before Modern's unpermitted dredging and cannot themselves constitute a legal cause of any subsequent flooding." For the reasons set forth hereafter, the District Court's legal conclusion is erroneous.

1. The District Court's Ruling Is Contrary To Fundamental Nuisance Abatement Principles Inhering In The Right To Protect Property

Upon statehood, Florida adopted the English common law. Fla. Stat, § 2.01. It recognized that flooding resulting from failure to maintain a drainage ditch constituted an actionable nuisance abatable by immediate self-help.[16] Consistent with the English common law, the Florida Supreme Court holds that "regular and

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instead requires the restoration and perpetuation of the condition causing the physical invasion of property.

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[16] "So if my neighbor ought to scour a ditch, and does not, whereby my lands is overflowed, this is an actionable nuisance" and " . . . such nuisance may be abated, that is, taken away or removed by the party aggrieved thereby . . . " Sir William Blackstone, *Commentaries on the Laws of England* Bk. III, ch. 13 at 217, ch. 1 at 5 (Thomas M. Cooley ed.) (3rd Ed. Rev. 1884). Blackstone further explains that " . . . the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an ***immediate*** remedy, and cannot wait for the slow progress of ordinary forms of justice." *Id.* At Book III, ch. 1, p.5.

4. The District Court's Ruling Is Contrary To Well-Established Takings Precedent Holding That Governmentally Authorized Or Compelled Physical Invasions of Property Constitute *Per Se* Takings

The District Court's ruling is also contrary to Florida and United States Supreme precedent consistently holding that government conduct that compels or authorizes the physical invasion or occupancy of private property by the public constitutes a *per se* taking requiring compensation without regard to the public interest underlying the government action or the impact on the landowner.

For example in *Loretto v. Teleprompter*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), the United States Supreme Court, relying upon *Pumpelly*, held that a New York law requiring a landlord to allow CATV company to install cable device on an apartment building occupying one and one-half cubic feet of space constituted a taking. The rationale for the rule is that permanent physical occupation of another's property is the most serious form of invasion of an owner's property interests. *Id.* at 435. The Florida Supreme Court relying upon *Loretto* has adopted the identical test. *See Storer Cable T.V. v. Summerwinds Apartments*, 493 So. 2d 417 (Fla. 1986); also see, *Beattie v. Shelter Properties, IV*, 457

So. 2d 1110 (Fla. Dist. Ct. App. 1st Dist. 1984).[21] Thus, under Florida law, "[t]o establish a claim for inverse condemnation, the property owner is [only] required to demonstrate . . . a ***continuing*** physical invasion of the property . . . " *Bakus v. Broward Co.*, 634 So. 2d 641, 642 (Fla. Dist. Ct. App. 4th Dist. 1993).

If Modern repaired a hole in a fence on its property to exclude the public, and St. Johns required the reopening of the hole, and interfered with Modern's ability to repair the hole, thereby enabling public access to Modern's property, no one would seriously contend that such interference would escape liability under the Takings Clause. ***It should make no constitutional difference whether the invading force is the public or, as in the case, the public's drainage.***

In asserting the right to require restoration and maintenance of the blocked condition of EW-1 and NS-I, St. Johns, standing in the shoes of the public, necessarily asserts the right to produce ***all*** the results which naturally follow from the existence of the blocked condition. In effect, St. Johns asserts a right under chapter 373, Florida Statutes, to require the continued impoundment of floodwaters upon Modern's property. Such right is an easement which

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[21] See also, *Kaiser Aetna*, 444 U.S. at 164 (U.S. Supreme Court held that imposition of a navigational servitude authorizing public access of a private marina as a condition of a federal dredge and fill permit was taking of easement of passage).

cannot be taken, even for public use, without compensation. *See Eaton v. B.C. & M.R.R.*, 51 N.H. 504 (N.H. 1872).

The District Court's conclusion that St. Johns conduct could not be a taking because it merely restored the status quo flooded condition of Modern's property cannot be squared with well-established physical invasion takings cases.

5. The District Court's Narrow Interpretation Of Legal Causation Ignores Applicable Established Proximate Causation Principles

Causation in takings cases closely follows tort proximate cause principles.[22] "[A] property loss compensable as a taking . . . results when the government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable

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[22] *City of Monterey v. Del Monte Dunes at Monterey, LTD.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L.Ed.2d 882 (1999) (at common law suits to recover just compensation traditionally framed as common-law tort actions); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 47-48 (1985) ("By the central premise of representative government, . . . [tort proximate cause] rules apply when government stands in the shoes of a private defendant [in a takings case]"). "'Inverse condemnation law is tied to, and parallels tort law.'" *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Cir. 2003) (quoting 9 Patrick J. Rohan & Melvin A. Reskin, *Nichols on Eminent Domain* § 34.03[1] (3d ed. 1980 & Supp. 2002); *Modern v. United States*, 404 F. 3d 1335 (Cir. 2005).

result of an authorized activity. . . ." *Banks v. United States*, 69 Fed. Cl. 206, 212 (2006).

The District Court's narrow view of legal causation overlooks the fact that once Modern removed the blockages, thereby draining its property, the cause of any ***subsequent*** flooding became St. Johns' requirement that the preexisting condition be restored and maintained. Established continuing tort and indirect

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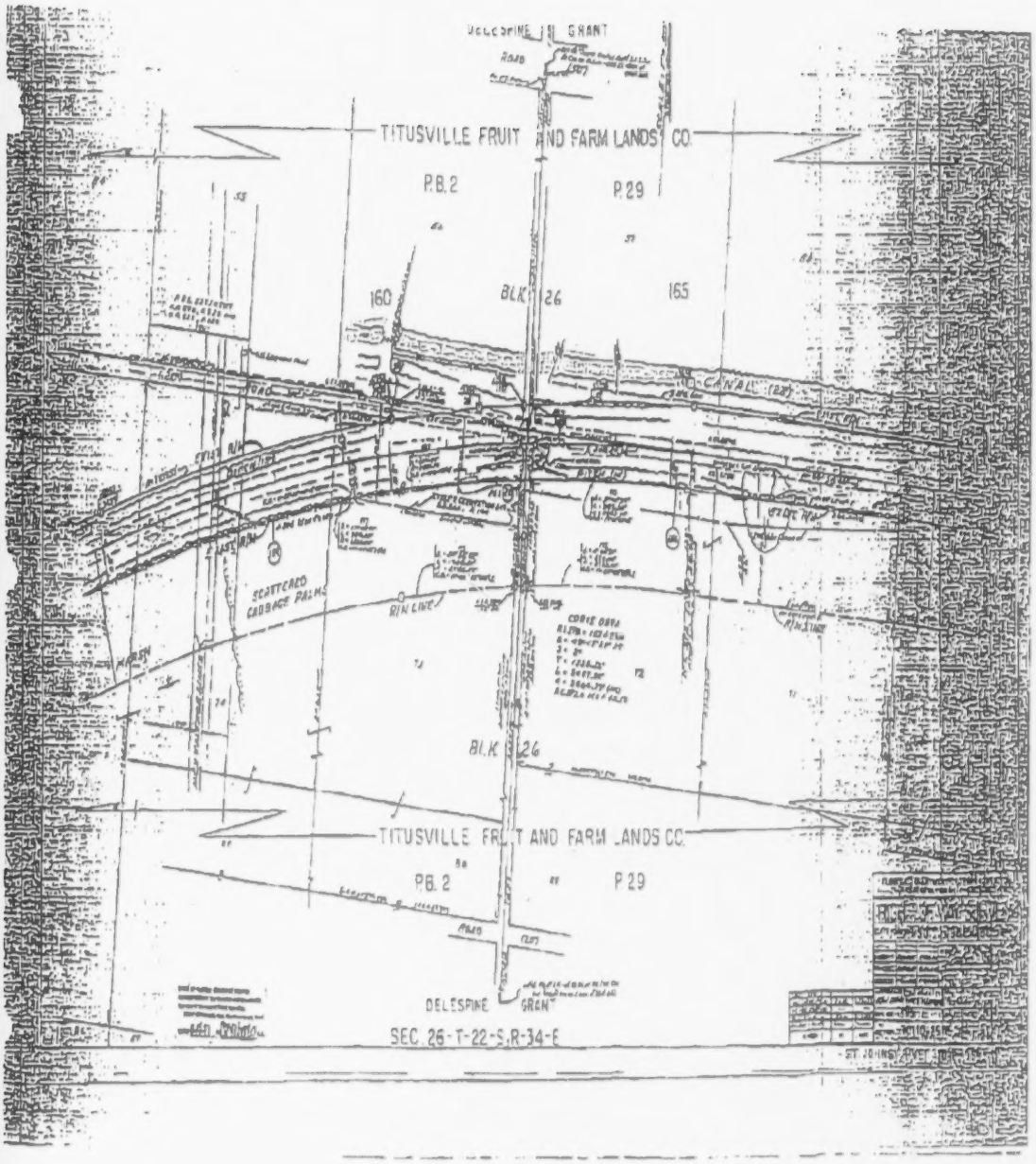
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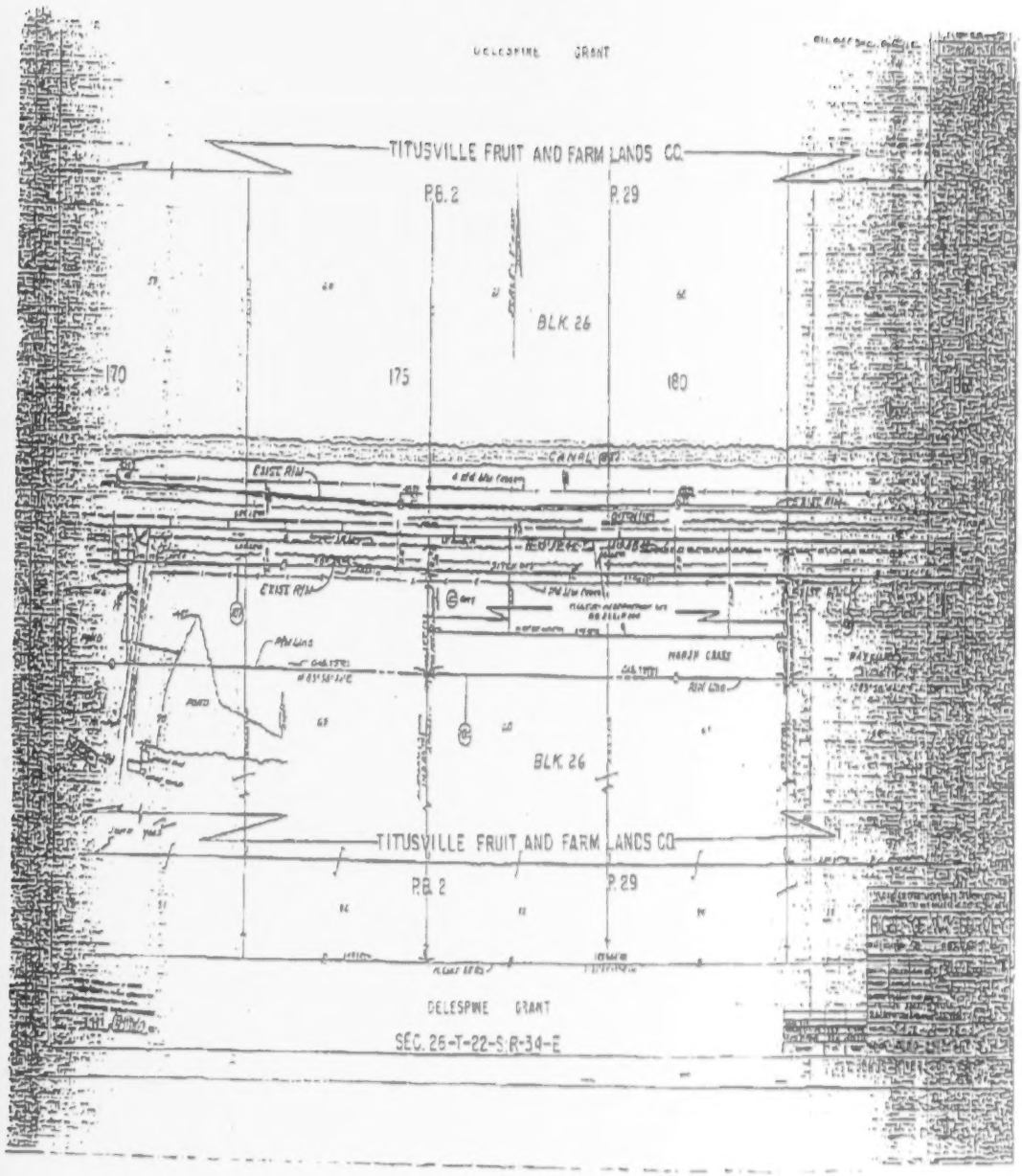
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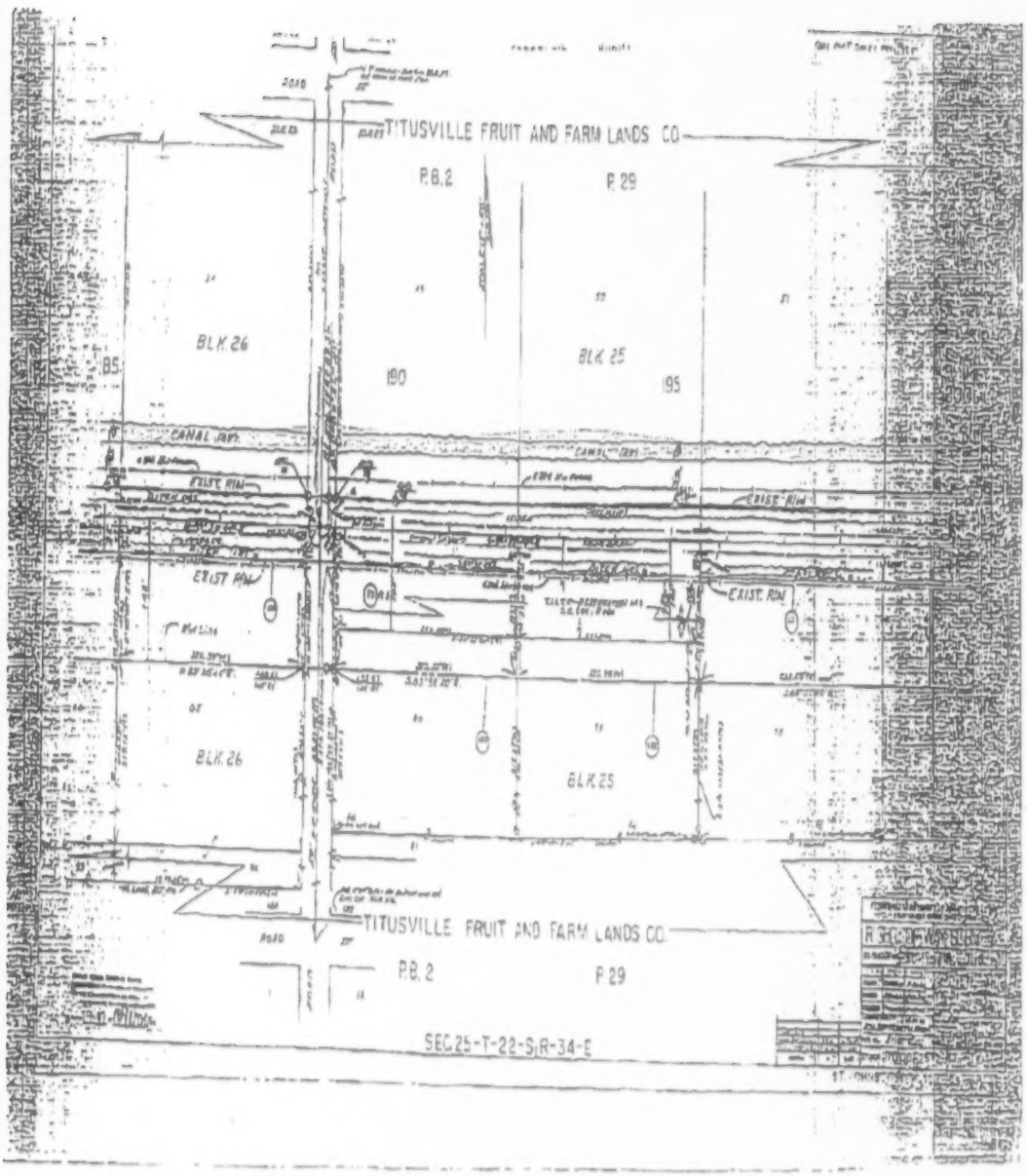
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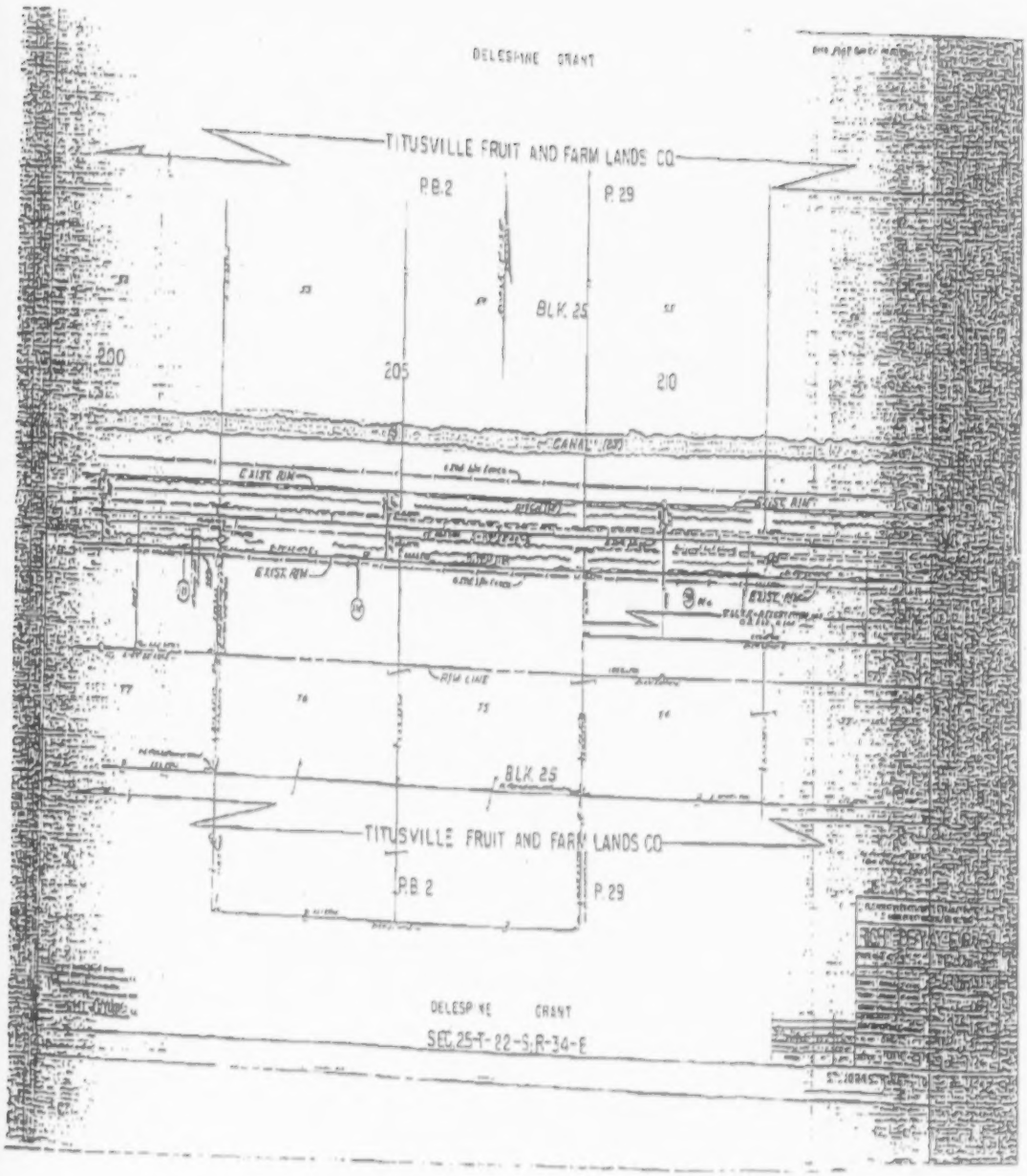
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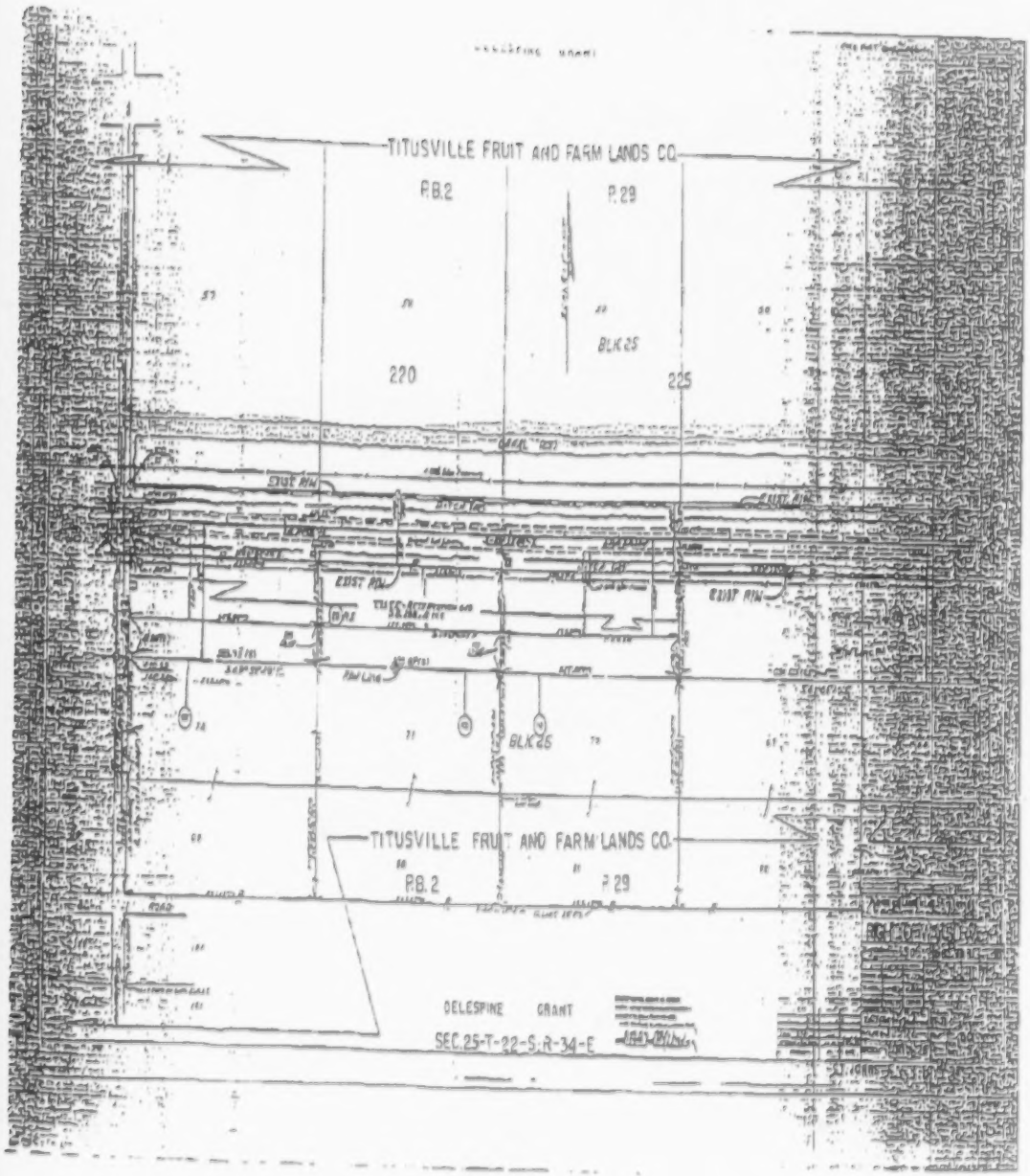
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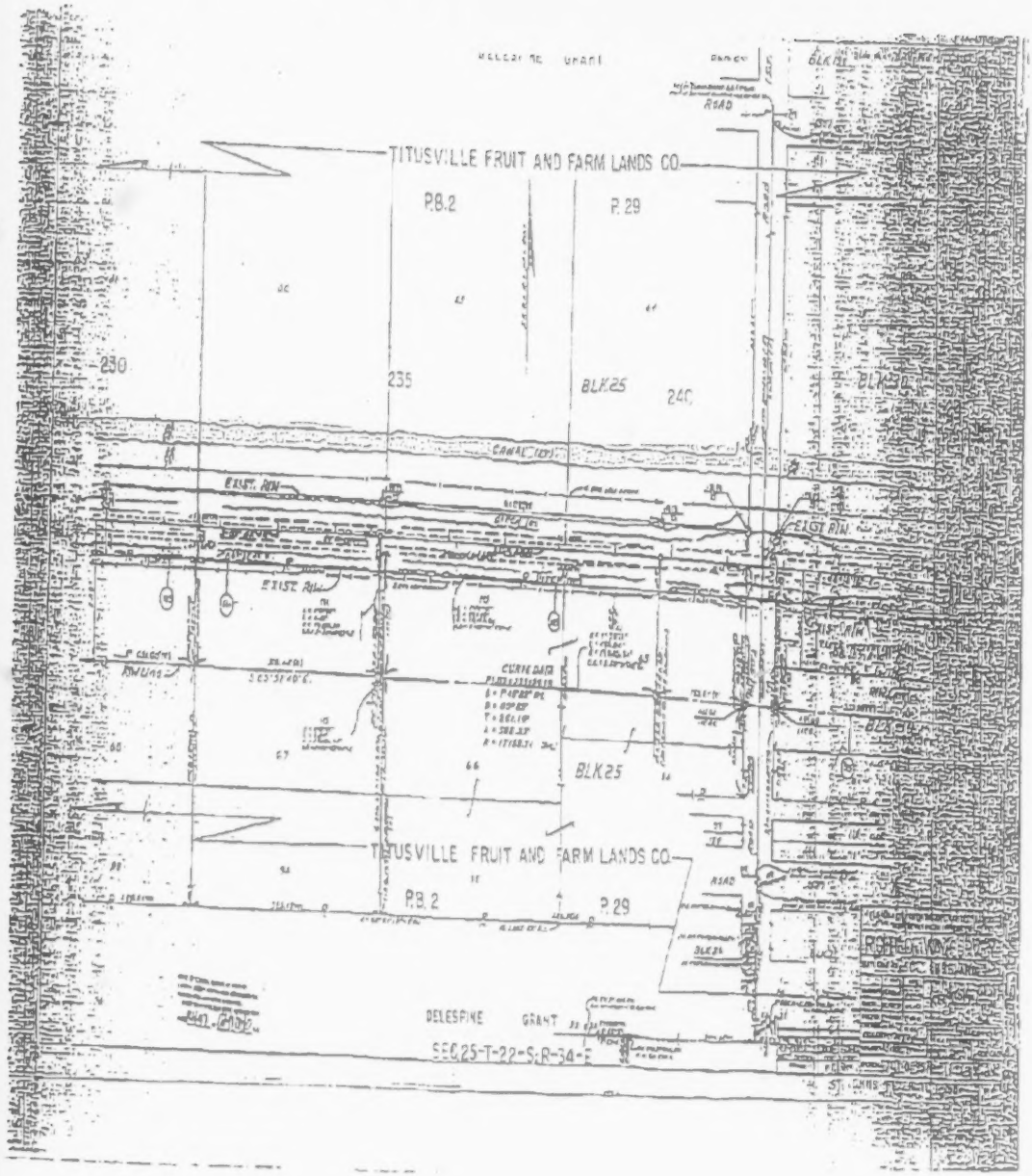
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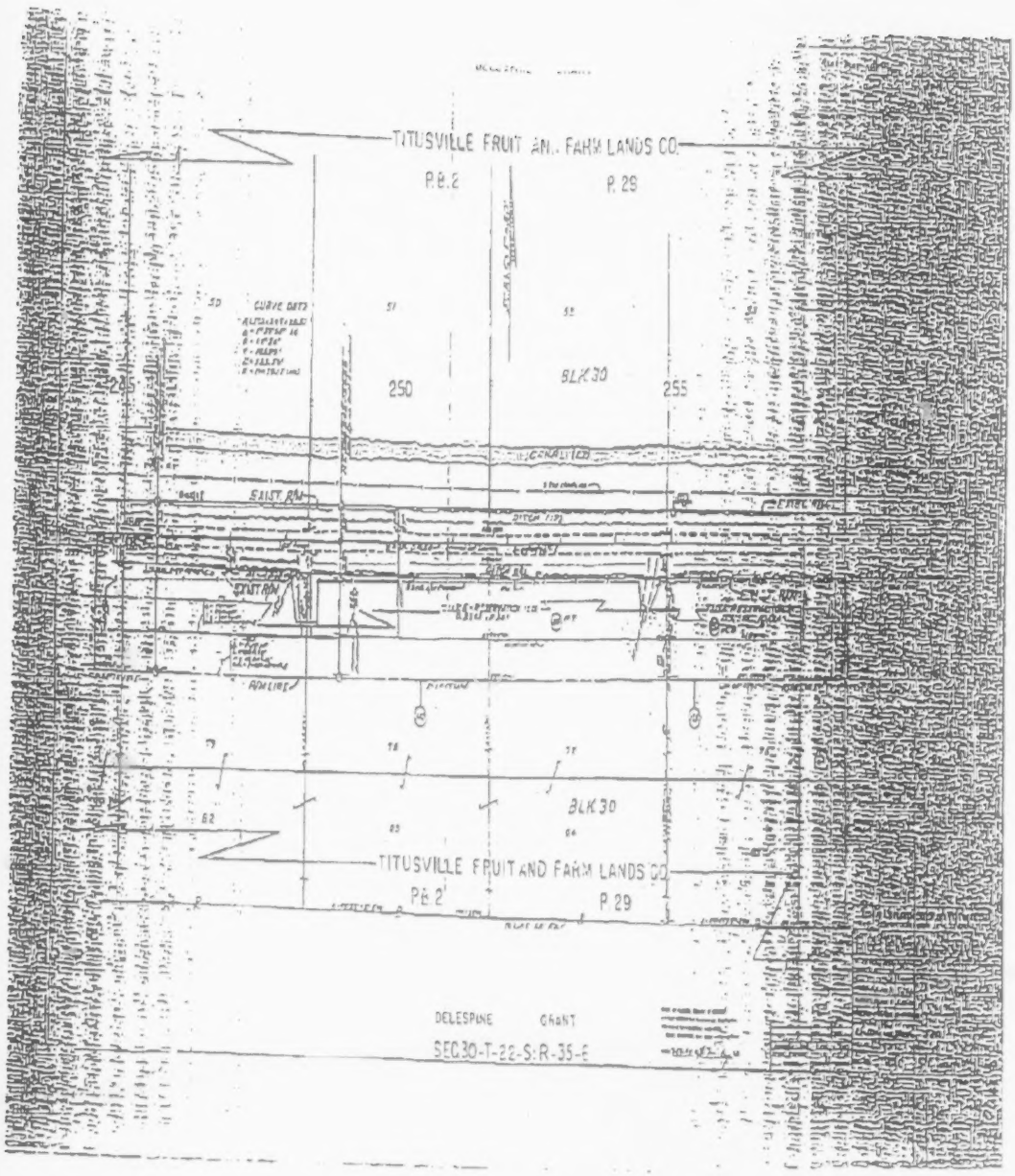
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EAST RW
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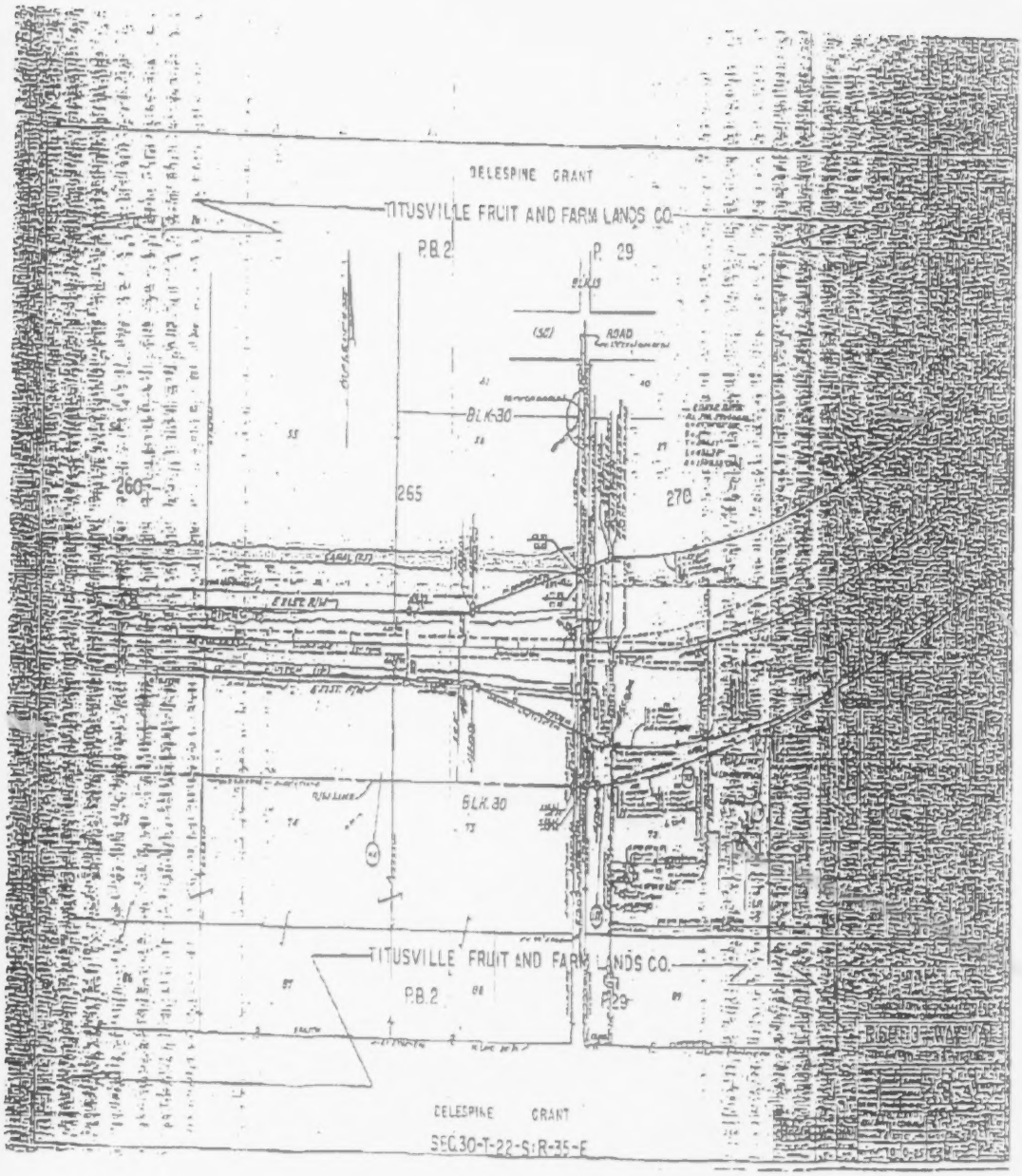
TITUSVILLE FRUIT AND FARM LANDS CO
P.B. 2
P. 29
DELESPINE GRANT
SEC 30-T-22-S-R-35-E


DELESPINE GRANT
TITUSVILLE FRUIT AND FARM LANDS CO.
P.B.2
P. 29
BLK.B
(SR)
ROAD
BLK-30
260
265
270
BLK. 30
TITUSVILLE FRUIT AND FARM LANDS CO.
P.B.2
P29
DELESPINE GRANT
SEC.30-T-22-S-R-35-E